A Tricky Move

Tobias Lock 2021-03-19T18:15:29

The European Commission's decision to commence legal proceedings against the United Kingdom for unilaterally extending certain grace periods for the movement of goods in contravention to the Northern Ireland Protocol is legally sound, but politically tricky. In legal terms, the decision to launch both infringement proceedings and take first steps towards arbitration is the most promising avenue towards UK compliance with the Protocol. Yet it brings with it a political risk of further escalating the tensions around the Protocol within Northern Ireland and between the EU and the UK.

Background

On 3 March the UK Government announced that it would unilaterally extend the grace period for the movement of agrifood from Great Britain to Northern Ireland, which was supposed to expire on 31 March. That grace period allowed certain traders (notably supermarkets) to ship food to Northern Ireland without having to undergo full customs and regulatory procedures. The grace period had been announced just before the end of the Brexit transition period and thus just in time for when the full effects of the Protocol on Ireland/Northern Ireland would kick in. In technical legal terms this happened by way of a unilateral declaration by the UK, of which the EU 'took note' and which it said would 'inform the position of the Union as regards recourse to the exercise of the powers referred to in Article 12(4) of the Protocol'. The powers referred to by Article 12 (4) are amongst others the Commission's powers of enforcement under the EU Treaties. The unilateral declaration did not envisage an extension of the grace period, let alone a unilateral extension.

That same week, the UK made a further announcement that it would not require customs declarations to be completed for most parcels sent from Great Britain to Northern Ireland. By contrast to the grace period, this practice had never been expressly agreed with the EU, but so far had been tolerated, even though it would appear to contradict the UK's obligations under the Protocol on Ireland/Northern Ireland. The Protocol nominally keeps Northern Ireland within the customs territory of the UK, but Article 5 (3) of the Protocol makes it clear that the EU customs code applies to Northern Ireland resulting in EU customs duties being payable for imports into Northern Ireland. This also applies to imports from Great Britain, unless the good in question is not at risk of subsequently being moved into the EU, i.e. across the Irish border. The precise definition of 'goods at risk' is left to the Joint Committee set up by the Withdrawal Agreement (WA), but Article 5 (2) of the Protocol is phrased in such a way that all goods are considered 'at risk', unless certain exceptions apply.

Before this background, the UK's unilateral decisions exempting whole chunks of trade from the Protocol are problematic. The EU Commission's reaction followed

promptly with an announcement that it would 'respond to these developments in accordance with the legal means established by the Withdrawal Agreement and the Trade and Cooperation Agreement'. The UK's move had clearly rung alarm bells in Brussels because it was strongly reminiscent of the UK's previous attempt to adopt the Internal Market Bill, which – if it had passed unamended – would have allowed UK ministers to unilaterally disapply parts of the Protocol. Back then in September, the Secretary of State for Northern Ireland even admitted that the move breached 'international law in a very specific and limited way'. The Commission started infringement proceedings, which became moot after the offending clauses were removed from the Bill.

The Commission then took its time before announcing its precise response on 15 March: a letter of formal notice and a political letter calling for bilateral consultations in the Joint Committee.

The Commission's enforcement options and choices

According to its Article 182, the Protocol on Ireland/Northern Ireland forms an integral part of the WA, so that the dispute settlement mechanism provided for in Articles 167-181 is applicable to it. The WA envisages arbitration as the only form of third-party dispute settlement. Arbitration must be preceded by consultations within the Joint Committee, which are initiated by way of written notice. If after three months of that written notice the Joint Committee has not arrived at a mutually agreed solution, the aggrieved party may request the establishment of an arbitration panel.

Where violations of Article 5 of the Protocol are concerned, however, the EU has another option. Article 12 (4) of the Protocol stipulates that the EU institutions 'have the powers conferred upon them by Union law'. This means that the Commission has the power to initiate infringement proceedings, which the Court of Justice has jurisdiction to decide according to Article 258 TFEU. This is not contradicted by the exclusivity clause contained in Article 168 WA, which says that for any dispute between them the EU and the UK 'shall only have recourse to the procedures provided for in this Agreement' for two reasons: first, the Protocol forms part of the WA, so that dispute resolution mechanisms envisaged by the Protocol do not contradict Article 168; and second, the infringement procedure is not strictly speaking a procedure to resolve disputes between the EU and the UK, but a procedure to ensure the correct application of EU law in the Member States and – in the case of Northern Ireland – in places where EU law must be applied in the same way as in the Member States.

These two possible avenues for enforcing the Protocol explain why the Commission decided to send both a formal letter of notification and an 'political letter'. A formal letter of notification initiates the Article 258 procedure. Unless the UK provides a satisfactory reply – which is unlikely – the next steps will be a reasoned opinion and then a procedure before the Court of Justice. The 'political' letter sent by

Commission Vice-President Šef#ovi# is not solely political, but also has a legal component in that it formally asks for consultations under Article 168 WA and – in case those consultations fail – announces further steps, i.e. the establishment of an arbitration panel.

A legally prudent move?

So why did the Commission choose to pursue both avenues? The Commission did not provide an answer to this question, but here is a suggestion. The UK's unilateral announcement to not enforce certain aspects of EU law when it comes to trade between Great Britain and Northern Ireland would appear to be a fairly obvious breach of EU law, for the enforcement of which Article 258 TFEU provides a straightforward avenue. If it came to third-party dispute settlement, the decision would ultimately be made by the Court of Justice, which is the only court competent to interpret EU law. Hence, even a case before an arbitration panel under the WA would probably end up before the Court of Justice since Article 174 WA provides for a mandatory reference to the Court of Justice by the arbitration panel in cases where the interpretation of EU law is at issue. While this might explain recourse to Article 258 TFEU, it does not explain why the Commission in parallel took first steps towards arbitration in the same matter on the same legal questions.

This is where one has to remember a disadvantage of Article 258 TFEU: it is difficult to enforce. There is no satisfactory answer to the question of what would happen if the UK chose to ignore a judgment by the Court of Justice finding it in breach of its obligations under the Protocol. Of course, the Commission could then instigate further proceedings according to Article 260 (2) TFEU, which might result in the UK being found liable for penalty payments and/or a lump sum payment. But again, the question might be asked: what if the UK still does not comply?

This is where the advantages of the arbitration panel become clearer. Article 178 WA spells out the consequences of non-compliance with an arbitration panel ruling. While it mirrors Article 260 TFEU in first relying on penalty payments or lump sum payments, it goes a crucial step further if these are not made. It allows for suspension of parts of the WA or – crucially – 'parts of any other agreement between the Union and the United Kingdom under the conditions set out in that agreement'. This is a thinly veiled reference to the agreement on the future relationship between the EU and the UK, the Trade and Cooperation Agreement (TCA), which itself contains a clause reflecting this. Article INST.24 (4) TCA says that where' a Party persists in not complying with a ruling of an arbitration panel established under an earlier agreement concluded between the Parties, the other Party may suspend obligations under the covered provisions referred to in Article INST.10'. The covered provisions in Article INST.10 are all provisions of the TCA with a few exceptions. Notably, it includes all provisions on trade in goods with only minor exceptions. This would for instance allow the EU to suspend tariff free trade in certain goods, should the UK not comply with the ruling of an arbitration panel in this case.

Hence it makes perfect legal sense to pursue both avenues.

A politically prudent move?

But is this also a politically prudent move? Here the answer is less straightforward. On the one hand, the EU had to react to a provocative move by the UK, which occurred while discussions over an extension of the grace period were still ongoing in the Joint Committee. Given the UK's apparent unwillingness to engage in a conversation a legal reaction was the only route open to the EU. The EU's hope must, however, be that it will never have to follow through with the entire legal process. It is hard to imagine that the current UK Government would publicly consider a ruling by the Court of Justice in this matter legitimate. After all, Brexit had been sold to the public as a hard separation from the EU, which ended the jurisdiction of the Court. This points to the Protocol's Achilles heel: its effective operation is entirely dependent on UK compliance as it is the UK which has to apply the rules of the Protocol within its jurisdiction.

The Protocol is a serious bone of contention in Northern Ireland where the First Minister and her party, the DUP, is calling for it to be dismantled and, presumably, replaced with an arrangement that would see the customs and regulatory border move to the border between Ireland and Northern Ireland. The UK Government appears to be prepared– at least temporarily – to jump on that same band wagon, even though it is the same government that had recently won an election on the basis of an 'oven-ready' Brexit deal, which included that very Protocol.

Unfortunately, the Commission is itself to blame for this rapid deterioration of support for the Protocol. Before 29 January, calls to suspend the Protocol or indeed to scrap it had been confined to the hard core of the DUP. But the Commission's thoughtless attempt at invoking Article 16 at the height of the Astra Zeneca row changed the dynamic and gave the UK government an excuse for moving one step away from joint ownership of the Protocol and, by extension, the peace process in Northern Ireland.

EU legal action was perhaps unavoidable; after all the Commission had to do something. But seeing it through could prove counter-productive. Both procedures initiated require lengthy pre-litigation procedures, which should allow for ample space for a diplomatic resolution of the issue. One can only hope that the Commission will keep its calm and find a way to resolve the matter in a way that allows both sides to save face and avoid further confrontation; that preserves the Protocol, but which also addresses some of the practical difficulties encountered in getting the Protocol up and running.
